

Proportionality, Territorial Occupation, and Enabled Terrorism

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Abstract

ABSTRACT. Some collateral harms affecting enemy civilians during a war are agentially mediated – for example, the US-led invasion of Iraq in 2003 sparked an insurgency which killed thousands of Iraqi civilians. I call these ‘collaterally enabled harms.’ Intuitively, we ought to discount the weight that these harms receive in the ‘costs’ column of our ad bellum proportionality calculation. But I argue that an occupying military force with de facto political authority has a special obligation to provide minimal protection to the civilian population. As a result, when an occupying military force collaterally enables a harm affecting the civilian population, the weight that the harm ought to receive in the ad bellum proportionality calculation is unaffected by the fact that the harm is agentially mediated – it ought to be weighed at least as heavily as those harms that the occupying force collaterally commits directly. As a result, satisfying the ad bellum proportionality constraint in wars of territorial occupation is more difficult than it has been thought.

1. Introduction

The US-led invasion of Iraq in 2003 unintentionally but foreseeably (i.e., collaterally) sparked an insurgency the members of which intentionally killed

thousands of Iraqi civilians. The aim of this insurgency was largely to undermine the coalition-organized security and reconstruction apparatus by exposing its weaknesses and by threatening perceived collaborators.¹ These acts of terrorism would very likely not have been committed had the US and its allies not invaded Iraq. To what extent, then (if at all) do the US and its allies bear moral responsibility for these harms?

History is rife with examples in which one side in a war sparks atrocities committed by the other side. The worst atrocities committed by Serbian forces following the 1999 Račak massacre in Kosovo were foreseeably precipitated by NATO's bombing campaign in Serbia. NATO Commander General Wesley Clark wrote that he had informed Secretary of State Madeline Albright that if NATO were to proceed with its plan to bomb Serbia, 'almost certainly [the Serb forces] will attack the civilian population,' which NATO will be un-able to prevent.² In the 2011 Libyan civil war, NATO military intervention provided Libyan rebels with the opportunity to resist Gaddafi's Loyalist forces, who, in response, committed war-crimes. An International Criminal Court investigation has found evidence of a range of abuses by Loyalist forces, including torture, systematic rape, the use of civilians as human shields, and the blocking of humanitarian supplies.³ Again, we can ask: to what extent, if it all, does the US or NATO bear moral responsibility for these harms?

The point can be put more generally: to what extent, if at all, are we morally responsible for *collaterally enabled* harms in a war? Collaterally enabled harms are a specific kind of side-effect resulting from fighting the enemy in a war: these are the harms that the enemy will commit, against our will,

¹ *Human Rights Watch, A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, S. L. Whitson (ed.), Vol. 17. No. 9(E) (New York, NY: Human Rights Watch, 2005), pp. 20–22.

² Wesley Clark, *Waging Modern War: Bosnia, Kosovo, and the Future of Combat* (New York: Public Affairs, 2002), p. 171.

³ International Criminal Court Office of the Prosecutor, Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (The Hague: International Criminal Court, 2011).

should we fight them – and which the enemy would not otherwise commit. Though I will focus on collaterally enabled *terrorism*, collaterally enabled harms are not limited to unjust attacks, or to intentional attacks on civilians. Suppose our government wages an unjust war against a foreign power, which responds by launching attacks on legitimate military targets that they would not have otherwise attacked – these count as harms that our government has collaterally enabled. (I will henceforth use the term ‘enabled’ as shorthand for ‘collaterally enabled’ unless I indicate otherwise).

Determining whether and the degree to which we are responsible for enabled harms is crucial in determining whether, for any given side in a conflict, that side’s war satisfies the constraint of proportionality. According to this constraint, the benefits consisting in achieving a war’s aims must be worth the harms for which we are responsible in the course of waging that war. The issue is whether the enabled harms ought to be included in the ‘costs’ column of our proportionality calculation – and if so, whether their weight should be discounted (i.e., diminished but not eliminated in weight) in light of the fact that enabled harms are mediated by the agency of others.

There seem to be three views in the literature regarding the role of enabled harms in the calculation of proportionality. I call these ‘constant discount’ views, since according to each, there ought to be a constant weighting – none, full, or partial – for enabled harms. On one extreme, the harms we enable are not included in our proportionality calculation at all. On the other extreme, the harms we enable ought to receive undiscounted weight in our proportionality calculation. This sort of view has been defended by Jeff McMahan.⁴

According to a view between these extremes, the harms we enable should be included in the proportionality calculation but their weight should be discounted, since the harm is agentially mediated. This sort of view has been defended by Thomas Hurka.⁵

⁴ Jeff McMahan, ‘Proportionality in the Afghanistan War,’ *Ethics and International Affairs* 25(2) (2011): pp. 143–154.

⁵ Thomas Hurka, ‘Proportionality in the Morality of War,’ *Philosophy & Public Affairs* 33 (2005): pp. 34–66.

I will argue that the constant discount views are far too simple: the role that enabled harms play in the calculation of proportionality depends on the type of war being waged. Focusing on military conflicts in occupied territories, I will argue that when an occupying military force imposes martial law, it is obligated to provide at least minimal protection for the civilian population over which it has *de facto* political authority. When an occupying force *enables* the very harms that it is supposed to prevent, it flouts its obligation to protect the civilian population. As a result, the weight that these enabled harms receive in the proportionality calculation is unaffected by the fact that these harms are agentially mediated. That is, the special obligation that an occupying force has to protect the civilian population undermines the moral relevance of the agentially mediated character of enabled harms. So, when an occupying force enables an insurgency to commit acts of terror against the local population, those harms ought to be weighed at least as heavily as the equally severe collateral killings that the occupying military force commits directly. (This scenario describes the situation in Iraq following 2003.) If my arguments are correct, then it is significantly more difficult than it is often thought to satisfy the constraint of proportionality in wars where a military force occupies a foreign territory.

Before I critically assess constant discount views of enabled harms, and before I lay out my positive account of the role that these harms play in the calculation of proportionality, it is necessary to say more about the proportionality constraint itself.

2. The Proportionality Constraint

There are two types of proportionality constraint in war: *ad bellum* proportionality weighs the costs and benefits of the war *tout court*, while *in bello* proportionality weighs the costs and benefits of particular acts within a war. The principal claims I will make about proportionality will be about *ad bellum* proportionality, though there will clearly be implications for *in bello* proportionality as well.

In calculating proportionality, I assume that the deaths of innocents who are killed intentionally ought to weigh more heavily in the calculation of proportionality than the deaths of innocents who are killed collaterally. So,

in calculating proportionality, the weight of collateral civilian deaths ought to be discounted relative to the weight of intentional civilian deaths. I assume this because I assume that the right not to be killed deliberately in war – i.e., as a means to some end or as an end itself – is more stringent than the right not to be killed collaterally – i.e., as a foreseeable side-effect in the pursuit of some aim.⁶

Some might argue that by distinguishing collateral from intentional civilian deaths in the calculation of proportionality, I have misconstrued the function of the proportionality constraint in war. Calculating *in bello* or *ad bellum* proportionality presupposes that the constraint of discrimination (which prohibits intentionally killing non-liable targets) will be satisfied. On this understanding, the purpose of the proportionality calculation is to help us determine whether the harms we *collaterally* bring about – such as the collateral harms to civilians – are disproportionate compared to the relevant benefits of the military act or the war in question. The harms we *intentionally* impose on non-liable targets are not considered in this calculation, on the grounds that such harms have already been ruled out by the constraint of discrimination.

If this view is correct, then it does not make sense to say that collaterally caused civilian deaths ought to be discounted relative to the weight of intentionally caused civilian deaths – since the proportionality calculation does not consider intentionally imposed harms to non-liable targets. But it seems to me that the proportionality calculation ought to include such harms.⁷ This is because the discrimination constraint is not absolute – intentionally killing non-liable targets can be permissible if doing so is necessary to avert a sufficiently greater harm. But if the constraint of discrimination is not absolute, then the conditions under which it may be overridden are determined by comparing the effects of obeying it with the effects of violating it. This is just to say that the conditions under which the constraint of discrimination can be violated are determined by a calculation

⁶ Jeff McMahan has been a prolific defender of this view. See especially Jeff McMahan, *Killing in War* (USA: Oxford University Press, 2009), pp. 155–202.

⁷ For a defense of this construal of the proportionality constraint see McMahan, *Killing in War*, Chap. 1.

of proportionality. If intention is relevant to the permissibility of imposing harms, then the proportionality constraint will be more restrictive in its application to harms imposed *intentionally* on non-liable targets than it will be in its application to harms imposed *collaterally* on such targets. And this is just to say that the weight of collaterally imposed harms ought to be discounted relative to the weight of intentionally imposed harms.

Similarly, we might ask whether the weight of the harms that we directly commit in a war ought to count more heavily in the calculation of proportionality than the weight of equally severe harms that we *enable* in that war. In what follows I turn to a critical assessment of constant discount views regarding the role of enabled harms in the calculation of proportionality. These views can be categorized according to *whether* and *how* enabled harms ought to be weighed in the calculation of proportionality.

3. Constant Discount Views

Suppose the dictatorial government of a small country, which I will call ‘the Dictatorship,’ launches an intra-territorial campaign of ethnic cleansing against a minority population. A second country, ‘the Superpower,’ is in a position to halt the massacres, but the only way to do so is to invade the Dictatorship, overthrow its government, occupy its territory, and facilitate the installation of a new regime. The invasion proceeds, and predictably results in few civilian casualties. However, many members of the military in the invaded country respond to the invasion and occupation by forming a partisan militia, which I will call ‘the Insurgency.’ The Insurgency uses guerilla tactics in order to compel the Superpower’s withdrawal before a provisional government can be established. If the Insurgency can compel the Superpower’s premature withdrawal, the Insurgency will be in a position to reestablish the toppled dictatorship and resume the interrupted campaign of ethnic cleaning. The tactics that the Insurgency uses include targeting civilian citizens of *their own* country in order to deter domestic civilian cooperation with the foreign occupiers. So though the Superpower’s successful invasion and occupation of the Dictatorship results in few

civilian casualties, the attempt to quell the Insurgency proves to be anything but bloodless.

Suppose the harms that the Superpower directly causes – including not only the loss of life and limb, but also the damage to the Dictatorship’s economy, infrastructure, and environment – are small enough to satisfy the constraint of proportionality, in that imposing these harms is justified if they are necessary to avert the ethnic cleansing that would otherwise have been perpetrated. But suppose that the acts of terrorism committed by the Insurgency are so extensive, that if we include them among the harms for which the Superpower is morally responsible – i.e., if enabled harms are admissible in the proportionality calculation and ought not to be discounted – then the war against the Insurgency will not satisfy the proportionality constraint.

So whether the war is just depends on whether enabled harms are admissible in the proportionality calculation. According to

The Permissive View

Enabled harms ought not to be included in the proportionality calculation.

Because the proportionality constraint is satisfied only if the relevant benefits of a war are worth its costs, and since, according to the Permissive View, enabled harms are not included in the ‘costs’ column of the proportionality calculation, it is much easier to satisfy the proportionality constraint if the Permissive View is correct (hence this view’s name).

One might argue for the Permissive View by arguing in favor of both (a) the view that one must be causally responsible for a harm in order for that harm to be morally admissible in the calculation of proportionality,⁸ and (b) the view that the actions of a fully autonomous agent are never causally

⁸ For a convincing denial of this view, see Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), pp. 146–165.

determined by an event that was not caused by that agent. For if an agent-causal view of human action is correct, then it is impossible to enable harms committed by a fully autonomous agent – and if *causal* responsibility is a necessary condition for moral responsibility, then we cannot be responsible for the harms that we do not cause. Thus *a* and *b* together yield the Permissive View. But whatever the merits of *a* and *b* individually, it is clear that the account they together yield is too strong. It would permit enabling the deaths of millions as a side-effect of achieving any just aim, no matter how inconsequential. To make matters worse, enabling such harms is permissible on this view even if doing so is *unnecessary* for the achievement of a just aim. This is because the constraint of necessity applies only to those harms for which one is responsible. For example, suppose there are two ways to save the lives of ten innocents: one requires only killing one innocent, while the other requires enabling the deaths of a million innocents. If the Permissive View is correct, then we are not just morally permitted, but *required* to choose the latter course of action. This is because the former would violate the constraint of necessity, in that there is another course of action – *viz.*, enabling the deaths of a million – that would result in a lesser cost. The deaths of one million count as a lesser cost, since the Permissive View prohibits these deaths from appearing in the ‘costs’ column of the proportionality calculation.

So much, then, for the Permissive View. The opposite of the Permissive View is, I believe, also mistaken. According to

The Restrictive View

The fact that enabled harms are agentially mediated is no grounds for excluding or discounting the weight of those harms in the calculation of proportionality.

This is also a constant discount view of enabled harms, insofar as it says that enabled harms ought never to be discounted in the proportionality calculation. So, for example, the acts of terrorism committed by the Insurgency will appear, with undiscounted weight, in the ‘costs’ column of the Superpower’s proportionality calculation. In this sense, the Superpower is responsible for enabled acts of terrorism committed by the Insurgency. This does not mean, of course, that the *insurgents* bear any *less* responsibility for those acts of terrorism – responsibility is not zero-sum.

Rather, the acts of terrorism would be counted twice – once in the Insurgency’s calculation of proportionality, and once in the Superpower’s calculation of proportionality.

Since the harms appearing in the proportionality calculation need to be significantly ‘offset’ by the relevant goods the war achieves, the Restrictive View, by including the undiscounted weight of enabled harms in the calculation, raises the bar on the amount of relevant good a war must achieve in order to satisfy the proportionality constraint. Thus the Restrictive View narrows the scope of wars that satisfy the proportionality constraint (hence the Restrictive View’s name).

The Restrictive View does not, however, imply that enabled harms should be weighed just as heavily as they would if we had committed them ourselves. Recall that one of the potentially morally relevant features of a harm, in determining the weight it ought to receive in the proportionality calculation, is whether that harm is committed deliberately. *Ceteris paribus*, a harm is morally worse if it is deliberately brought about as a means to the achievement of some aim than if it is merely foreseeably brought about as a side-effect of that aim. If intention is morally relevant in this way, then the acts of terrorism committed by the Insurgency will receive less weight in the Superpower’s calculation of proportionality than in the Insurgency’s calculation of proportionality – even assuming the Restrictive View. After all, when the Superpower enables acts of terrorism, it does so collaterally. When the Insurgency commits the acts of terrorism, it does so deliberately.

Hurka rejects the Restrictive View on the grounds that it has counterintuitive consequences with respect to weighing the deaths of enabled suicide bombers.⁹ Hurka’s worry (put in my terms) is this: though we might think that the deaths of those whom the suicide bomber kills should be included, with undiscounted weight, in the enabler’s calculation of proportionality, it strains belief to claim that the deaths of the suicide bomber *herself* ought to be included in the enabler’s calculation of proportionality, without being discounted relative to the other collateral

⁹ Hurka, 2005, p. 47.

deaths that we cause. But Hurka's worry is unfounded; all things being equal, the deaths of those who die by their own hand ought to count for significantly less in the calculation of proportionality than the deaths of those who die involuntarily. Thus we can substantially discount the deaths of enabled suicide bombers while maintaining the view that agential mediation is no grounds for excluding or discounting the weight of harms in the calculation of proportionality.

Though Hurka's worry is unfounded, the Restrictive View still seems too strong. If it is correct, the harms collaterally committed by the enemy ought to count *as heavily* in our calculation of proportionality as those which *we* collaterally commit. In these cases, when an enemy kills a civilian collaterally, it would be as if *we* had killed that civilian, in that this death would be included, with undiscounted weight, in our proportionality calculation. This is a difficult view to accept. Indeed, if it is correct, it might make the proportionality constraint prohibitively difficult to satisfy even in supposedly paradigm examples of just wars. For example, David Rodin points out that the defeat of Nazi Germany ultimately might have caused more harm than it averted.¹⁰ Even if this is correct, Rodin argues, it certainly does not mean that the war against Nazi Germany was unjust

(rather, he suggests it shows that a consequentialist appraisal of war is inadequate). But if the war caused more harm than it averted and if the harms Nazi Germany committed in the course of fighting the Allies ought to be included with undiscounted weight in the Allies'

proportionality-calculation on the grounds that the Allies could have avoided these harms by acceding to the demands of Nazi Germany, then the war would have violated the constraint of proportionality. I suspect, then, that adopting the Restrictive View would force us into a version of contingent pacifism, according to which virtually all wars with just causes, given how they are currently fought, are unjust.¹¹ One might argue that even if this

¹⁰ David Rodin, *War and Self-Defense* (USA: Oxford University Press, 2002), pp. 10–11. See also David Rodin, 'The Problem With Prevention,' in H. Shue and D. Rodin (eds.), *Prevention* (USA: Oxford University Press, 2007), pp. 143–170.

¹¹ I make this point in Saba Bazargan, 'Varieties of Contingent Pacifism,' in H. Frowe and G. Lang (eds.), *How We Fight* (USA: Oxford University Press, 2012)

conclusion is correct, it does not serve as a decisive argument against the Restrictive View. Indeed, supporters of proportionality-based contingent pacifism would welcome it. But if the Restrictive View does indeed entail a version of contingent pacifism, then adopting the Restrictive View comes at significant theoretical cost, which should give us pause.

Those who are inclined to reject the Restrictive View, either on the grounds that it implausibly narrows the scope of just wars, or on the grounds that mediated agency does indeed seem to attenuate responsibility of the enabling party, might be tempted by the following more balanced constant discount view.

The Intermediate View

Enabled harms ought to be included in the calculation of proportionality; but the fact that they are agentially mediated is grounds for discounting their weight.

On this view, if I unintentionally but foreseeably bring about a harm causally mediated by the autonomous agency of another person, then my responsibility for that harm is less than what it would have been had I collaterally committed the harm myself. If the Intermediate View is correct, then enabled harms ought to be discounted twice over in war – once because they are enabled collaterally, and again because they are agentially mediated. Thus enabled harms – including enabled acts of terrorism – ought to count for less in the calculation of proportionality than the harms we commit collaterally. On this view, the Superpower is somewhat responsible for the acts of terrorism it enables, but not as responsible for collateral killings that the Superpower commits itself. This seems to be the common sense view – it is sensitive to our intuitions regarding the moral relevance of the deliberate/collateral distinction, and the moral relevance of the committing/enabling distinction. Hurka, for instance, endorses a version of the Intermediate View.¹² Though I am sympathetic to the view that the

[forthcoming]. The relevant version of contingent pacifism would be what I call ‘proportionality based contingent pacifism.’

¹² Hurka, 2005, pp. 49–50.

agentially mediated character of enabled harms is a basis for discounting the weight of that harm, my purpose here is not to argue in favor of this view, but instead to show that even if it is correct, there are important and prevalent exceptions. And as a result of these exceptions, I will argue, we must reject the Intermediate View – insofar as it is a constant discount view. I will argue that how we weigh enabled harms in the calculation of proportionality will depend largely on the context in which those harms occur. The Intermediate View, by decontextualizing such harms, will often ascribe the wrong weights to these harms in the calculation of proportionality.

Returning to the example under consideration, the acts of terrorism which the Superpower enables ought to be weighed just as heavily as they would have been if the Superpower had collaterally committed those harms itself. This is because, in the example, the victims of the enabled harms are civilians under the protection of the Superpower's occupying military force. To understand why and how this consideration is relevant, I will begin with some remarks regarding the responsibilities of state-run law enforcement agencies.

4. Special Obligations of the Police

Police forces generally have a special obligation to protect the civilian population from certain sorts of criminal harms, in that it is incumbent upon them to prevent these wrongs within the licit means at their disposal. The obligation is *special* in that a contractual relationship with the state grounds a mandate to protect the civilian population from certain criminal harms; the resulting obligation is significantly stronger than the presumptive obligation that individuals outside the police force have to protect one another from criminal harms. Like the military, a police force is required to abide by constraints of proportionality, in that it has to weigh the moral benefits of the actions it undertakes against the moral costs.

Of course, because the nature of the mandate under which a police force operates is vastly differently from the nature of the mandate under which a military force operates, how proportionality is calculated is vastly different between the two types of organizations. Specifically, it is much worse for a

police force to collaterally harm innocent civilians than it is for a military force to do so. Thus, in the calculation of proportionality, the harms to innocent civilians that a police force causes receive substantially greater weight than the harms to innocent civilians that a military force causes. This is partly because the purpose of the military deployed in a warzone is to accomplish military objectives, while the purpose of the police is to protect the civilian population within its jurisdiction by enforcing criminal laws.

As a result of bearing a special obligation to protect the civilian population by preventing criminal harms, it is just as bad for a police force to *enable* criminal harms as it would be for it to collaterally *commit* those harms. Suppose a police force in a small town is attempting to stop a serial killer who has successfully eluded them despite their best efforts so far. The police force has managed, however, to capture the serial killer's former associate: another, far less prolific serial killer. This associate has a deep-seated hatred for the killer at large, as a result of a betrayal that led to the associate's capture. The associate knows the killer well; the authorities believe that if they arm and free the associate, she is very likely to find and kill the serial killer. However, in doing so, they will have traded one serial killer for another, albeit a less harmful one.

I think that no police force would be morally permitted to strike this bargain, even if it saves lives. This is not because I think there are *general* deontic constraints against enabling harms. Rather, it is because police agencies, *specifically*, have a special obligation not to facilitate crimes, especially ones as harmful as homicide, even as a side-effect of stopping further homicides. When a police force foreseeably causes criminal harms, it not only fails to abide by its special obligation to prevent such harms, but acts in precisely the *opposite* way that the police force's special obligation requires. For this reason, the fact that the enabled harm is agentially mediated is not grounds for diminishing its weight in the calculation of proportionality. This is just to say that enabled harms ought to be weighed at least as heavily as collaterally committed harms. A police force that *enables the killing* of innocents as a side-effect of preventing the killing of more innocents, acts no better than one which *kills* innocents as a side-effect of preventing the deaths of more innocents. This does not mean that the police can never permissibly enable harms – but only that doing so will very rarely be permissible, precisely because the weight these harms receive in the

‘costs’ column of the proportionality calculation is as great as the weight that committed harms receive.

One might argue that there is no need to claim that the police force’s special obligation effaces the moral relevance of the distinction between committing a harm and enabling that harm. Rather, one might argue, we can simply claim that there is a weighted, agent-centered constraint against allowing criminal harms. On this view, we *augment* the relative weights of the criminal harms that the police force allows. Thus the good that is achieved by allowing a criminal harm must be very significant in order to justify the associated violation of their special obligation to prevent criminal harms. But the example of the serial killers shows that the nature of the obligation that the police force has is more subtle than this: it is worse for a police force to violate their special obligation by *enabling* a criminal harm than it is to do so by merely allowing it. In response, one might say that that the weighted, agent-centered constraint on *enabling* harms is even more stringent than the one on allowing such harms. (This accords with the more general view that it is worse to cause a harm than it is to allow it to occur through inaction.) But this is just a less specific version of the view I am proposing. In effect, I am making a specific claim regarding *how much worse* it is to enable a harm than it is to allow it when we have a special obligation to prevent that harm. How much worse is it? I claim that enabling a harm is as bad as collaterally committing a harm of the same severity, when we have a special obligation to prevent that harm. When determining responsibility for a harm that one causes, it matters whether one causes the harm by committing it or by enabling it – but the relevance of this subtlety disappears when one has a special obligation to prevent that harm.

The state-sanctioned mandate that a police force has to prevent criminal wrongs within its jurisdiction is only one example of a special obligation to prevent a harm – a special obligation need not consist in anything so grandiose. For example, an explicit promise to prevent a harm grounds a special obligation to prevent that harm. The agent-relative duties that friends have to prevent harm from befalling one another are another example of a special obligation to prevent a harm. In these cases, the special obligation defeats or undermines the moral relevance of the distinction between enabling a harm and committing it.

So far I have argued that police forces have a special obligation to prevent criminal harms; as a result of bearing this obligation, the harms that it enables ought to be weighed as heavily, in their calculations of proportionality, as the harms that they collaterally commit. Now I will argue that an occupying military force has a special obligation of a similar sort.

5. Special Obligations of an Occupying Military Force

I claim that a military force deployed in a foreign country has a special obligation to protect the people – a special obligation of roughly the same sort that a law enforcement agency has. This is because an occupying military force is the political authority in the region it occupies. And a political authority has a presumptive obligation to provide minimal protection for its population. For this reason (returning to the example from Sect. 2) the Superpower has a special obligation to protect the civilian population against acts of terrorism committed by the Insurgency.

An occupying military force, insofar as it is not recognized as a legitimate political authority by the people, has at best *de facto* and not *de jure* political authority. But this does not relevantly affect the obligation that the military occupation has to protect the people. Though a political authority must have the political recognition of the people in order to permissibly exercise the *privileges* of authority, it can nonetheless be saddled with some of the *obligations* of authority – including the obligation to protect the people – without political recognition from the people. We too often focus solely on the legitimacy and permissibility of a military occupation, and too seldom consider the obligations that even illegitimate military occupiers have to the population under their control.¹³

This view regarding the obligations of a *de facto* political authority is anticipated by Asa Kasher and Amos Yadlin.¹⁴ They claim that military

¹³ For more on this neglected issue, see Jeff McMahan, 'The Morality of Military Occupation,' *Loyola International and Comparative Law Review* 31 (2009).

¹⁴ Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective,' *Journal of Military Ethics* 4(1) (2005): pp. 3–32.

occupiers, as the *de facto* sovereigns of the territory they occupy, have a special obligation to protect the civilians in the territory they occupy. ‘Belligerent occupation of the territory replaces the sovereign power of the territory by the military commander of the force that controls it, for as long as the occupation lasts. Sovereignty, even if temporary, involves duties of the authorities, including protection of human life and well-being of persons, in particular when they are not in any way involved in terror.’¹⁵ Of course, *all* military forces (occupying or not) have *some* obligation to protect civilians against collateral harms. But Kasher and Yadlin convincingly argue that the duties to minimize injury to innocents residing in an occupied territory are stronger than the duty to minimize injury to foreign innocents residing outside an occupied territory.¹⁶ The view I am proposing goes further than this, however. If a *de facto* political authority has wrecked the most basic and essential public services in the process of occupying the country, then the authority has an obligation to provide these services, if only in rudimentary form.

Among the ways that the special obligations conferred by *de facto* sovereignty affects the calculation of *ad bellum* proportionality, is by undermining a basis for discounting enabled acts of terrorism. I argued earlier that should a police force *enable* the very harms that it has a special obligation to prevent, then those harms ought to be weighed as heavily in its calculations of proportionality as the harms that it collaterally commits. Because an occupying military force, as a *de facto* political authority, has roughly the same sorts of special obligations that a police force has, the harms that *it* enables ought also to be weighed as heavily, in its calculations of proportionality, as the harms that it collaterally commits. This means that the agentially mediated character of the terrorist acts that the Superpower enables is *not* grounds for discounting their weight in the calculation of proportionality, since the Superpower has a special obligation to prevent those acts. Note, however, that this does not leave us with the absurd view that the Superpower is as responsible for the terrorist acts as the Insurgency

¹⁵ 15 Kasher and Yadlin, 2005, p. 15.

¹⁶ 16 Kasher and Yadlin, 2005, p. 17.

is. This is because the Insurgency commits the harms intentionally, whereas the Superpower enables the harms collaterally. This fact *is* a basis for discounting the harms that the Superpower enables.

One might worry that even if the special obligations that an occupying military force has are *of the same sort* that a police force has, they nonetheless might differ in their *strength*. Specifically, the worry is that though both have special obligations to protect the general population, the obligations of an occupying military force are weaker.¹⁷ So even if the agentially mediated character of enabled harms is *no* grounds for discounting the relevant harms that a police force enables, we cannot infer that the same is true for the harms that an occupying force enables. This suggests that a version of the Intermediate View does indeed apply: the harms enabled by an occupying military force ought to be discounted, albeit *less* than the harms enabled by a *non*-occupying military force. But what reasons do we have to believe that an occupying military force's special obligations to protect the civilian population are weaker in strength than those of a police force? I will respond to two possible reasons.

One might argue that an occupying military force's special obligations to protect the people are not as strong as those of the police, because combatants are not police officers; combatants have been trained primarily to achieve military goals – not to police the people. Thus they cannot be expected to prevent criminal activity in the way police officers can. But this fact does not reduce the overall *strength* of the obligations that an occupying force has – rather, it (a) narrows the *scope* of obligations, and (b) broadens the *method* by which these obligations can be permissibly discharged. The claim that an occupying military power has roughly the same sort of special obligation to protect the people that a police force has, does not entail the claim that the military is expected to act as a full-fledged state-run law enforcement agency. The scope of the protection is significantly circumscribed – only the most egregious rights-violations need to be prevented, such as the right against major assaults and thefts.¹⁸ And the

¹⁷ I am indebted to Tom Hurka for pressing me on this point.

¹⁸ There might also be obligations to prevent other sorts of harms, such as those threatening the occupied country's environment and cultural heritage. For example,

permissible *method* of protection is crude. An occupying military force is not obligated to conduct criminal investigations of the type required to mount evidence in a criminal court. Rather, the method of preventing egregious rights-violations can be limited to deterrence by armed patrols prepared to forcibly interrupt relevant criminal activity. This is just to describe martial law. The sort of minimal protection a military force is obligated to provide is consistent with suspending recognition of civil law, civil rights, and *habeas corpus*, while extending elements of military law to the civilian population. This obviously differs from the scope and method of police protection that a state-run law enforcement agency ought to provide.

Thus the fact that combatants cannot be expected to fulfill the role of the police need not lead us to believe that the special obligations a military force has are *weaker* than that of a police force; rather, they simply differ, both in their *scope* and in the permissible *methods* by which they can be discharged. One might, however, provide different grounds for thinking that the special obligations of an occupying military force are weaker than those of a police force. Specifically, one might argue that the special obligations of an occupying military force are weaker since such a force lacks legitimate political authority. On this view, the special obligations of an illegitimate political authority are weaker than that of a legitimate political authority, and thus weaker than that of a police force operating under the aegis of a legitimate government.

But if this view were correct then tyrannical regimes would be *morally permitted* to provide *fewer* protective services to its people, on the grounds

the harms that the coalition forces in Iraq enabled following the invasion of that country in 2003 include the looting of the National Museum of Iraq between April 10 and 12, in response to which the US State Department cultural advisors, and the chairman of the US President's Advisory Committee resigned in protest (BBC, 'US experts resign over Iraq looting.' 18 April 2003, Retrieved October 20, 2011, from BBC News: <http://news.bbc.co.uk/2/hi/entertainment/2958009.stm>). On my account, the weight that this enabled harms receives in the coalition force's calculation of proportionality is not mitigated by the fact that the harms was agentially mediated by the looters, since the coalition forces had a special responsibility to prevent this harm, as the occupiers and *de facto* political authority in Baghdad.

that such regimes lack political legitimacy. After all, on this view, the illegitimacy of a political authority weakens its obligation to protect the people. The government of a tyrannical regime could then justifiably claim that it does no wrong by failing to act according to the obligations it would have if it were a legitimate political authority. Clearly, something has gone wrong here – the fact that an authority is illegitimate cannot serve as a *justification* for neglecting the welfare of its people. This suggests that the obligations (though not the permissions) of a political authority are undiminished in strength by the authority's illegitimacy. So if we think that an occupying military force's special obligation to protect the people is not as strong as those of the police, then it cannot be because the occupying military force is illegitimate.

I have responded to two kinds of arguments for thinking that the special obligations of an occupying military force are not as strong as those of a police force. The first argument was that the inability of combatants to function as effective police officers diminishes the strength of its obligations. The second argument was that the illegitimacy of an occupying force diminishes the strength of its special obligations. Absent other reasons for thinking that the strength of the respective special obligations differ, we should consider their strengths to be roughly on a par precisely *because* they are of the same type – and thus conclude that the agentially mediated character of enabled harms is grounds for discounting such harms in *neither* case. That is, a state-run law enforcement agency and an occupying military force are the same in a fundamental respect: both have a special obligation roughly equal in strength to protect the people against certain sorts of harms. Hence, the Intermediate View, which says that the weight of enabled harms in war is discounted, is mistaken – at least with respect to acts of terrorism enabled by an occupying power. But this does *not* leave us with the absurd view that the Superpower is as responsible for the terrorist acts as the Insurgency is. This is because the Insurgency commits the harms deliberately, whereas the Superpower enabled the harms collaterally. This fact *is* a basis for discounting the harms that the Superpower enables.

Even if the special obligations of an occupying force are similar in strength to those of a police force, one might argue that the harms an enabled military force enables ought to be discounted if the occupying force is doing everything it its power, albeit unsuccessfully, to prevent these harms.

Returning to the example under consideration, one might argue that the Superpower has not *culpably* violated its special obligation to protect the people if it is doing everything it licitly can, while it occupies the country, to prevent the acts of terrorism it has enabled. After all, one cannot be blamed for transgressing a special obligation to prevent an event that cannot be licitly prevented. On this view, the relevant harms would still be included in the ‘costs’ column of the Superpower’s proportionality calculation, since the harms were enabled by the Superpower’s military intervention. But because the failure to act according to the special obligation to prevent these harms is non-culpable, the agentially mediated character of these harms would indeed provide a basis for discounting their weight. Or so it might be argued.

But this argument is mistaken for two reasons. First, even in the example as described, there is a straightforward sense in which it *is* the Superpower’s fault that its military force is unable to act according to its special obligation to protect the people – the Superpower has, after all, enabled the very harms that it is subsequently unable to prevent. One does not violate a special obligation to prevent an event that cannot be licitly prevented – unless one enabled that event in the first place. This is not simply to reiterate the claim that the Superpower bears responsibility for the harms they enable; rather, the point is that by *foreseeably* enabling the very harms that they antecedently know (or are in a position to know) that they will have a duty to prevent, the Superpowers set themselves up to inevitably violate their special obligation to protect the people. Hence, their violation can be appropriately regarded as culpable. Second, the Superpower can indeed, *ex hypothesi*, prevent the acts of terrorism – by withdrawing its forces from the country. If the best way to protect the people is to cease attempting to protect them, then a failure to cease might violate the special obligation to protect the people. The upshot is that the Superpower is relevantly responsible for the enabled acts of terrorism. That is to say, the agentially mediated character of the enabled harms is not a basis for discounting these harms.

Even though the Superpower has a special obligation to protect the people, and even though it is responsible for its failure to abide by this obligation, it is important to note that violating the obligation can be justified, in the same way that violating a duty not to kill the innocent can be justified – *viz.*, if doing so is necessary to avert a sufficiently worse evil. As a result,

foreseeably enabling the harms committed by the Insurgency might be the correct course of action for the Superpower. Or suppose that protecting the people will require the use of key resources and personnel that are otherwise needed to achieve aims that avert significantly worse evils. Under these circumstances, a violation of the obligation to protect the people can, again, be permissible.

Put differently, I have not argued that the Superpower has a decisive reason to act according to an obligation to protect the people (either by devoting the necessary resources or by ending the military occupation of the country). Rather, in determining whether enabling the relevant harms is permissible, we weigh them in the proportionality calculation; thus, in principle, the costs associated with these relevant harms can be outweighed by the benefits of enabling them. But I have stacked the deck against this possibility by arguing that the weight that these enabled harms receive is *not* discounted by the fact that they are agentially mediated. They are not discounted, because the Superpower has an obligation to prevent these harms – an obligation which can be permissibly violated, but only when the benefits of doing so are so high that they would outweigh collaterally *committed* harms of the same severity.

6. Implications

I have argued that even if we subscribe to the general principle that agential mediation is grounds for mitigating our responsibility for enabled harms, the context in which the harms are enabled by an occupying military force with *de facto* political authority represents an important defeater to this general principle. This defeater, insofar as it is operative in a host of modern wars, reveals constant discount views in general, and the intermediate view specifically, to be far too simple a guide for determining how we ought to weigh enabled harms in the calculation of *ad bellum* proportionality – sometimes we ought to discount for the agentially mediated character of enabled harms, and sometimes we ought not to do so.

More specifically, I have argued that the harms enabled by an occupying military force must often be weighed at least as heavily as the collateral harm that the occupying military force commits itself. This departs

significantly from how we tend to think of responsibility for enabled harms in war; we tend to think that it is worse for our forces to commit harms than it is for them to enable it. But if my arguments are sound, then this is not true, in which case it is significantly more difficult to satisfy the proportionality constraint in wars of military occupation. If we suspect, prior to invading a country, that a military occupation will spark an insurgency that will target civilians, and if we suspect that we will be unable to protect the civilian population against these harms, then in determining whether the proposed invasion satisfies *ad bellum* proportionality, we ought to weigh the harms we foreseeable enable as heavily as those we collaterally commit.

This is to say that the Intermediate View is mistaken in its claim that all enabled harms ought to be discounted. Still, in cases where there is no special obligation to protect the people from criminal harms, the weight of those enabled harms should indeed be discounted – on the grounds that they are agentially mediated. In these sorts of cases, the Intermediate View applies. Suppose the Superpower had opted to limit its military involvement to aerial bombardment, in the hope that this would cripple the government. The bombardment results in the widespread destruction of government agencies and institutions, including local police agencies. The Superpower, in this scenario, would not have a special obligation to protect the people from enabled criminal harms – not because the Superpower cannot discharge these duties without ground troops, but because without the ground troops the Superpower is not the *de facto* political authority. Of course, in this example, the rise in criminal activity that the Superpower enables by destroying local police forces would still be counted in the calculation of proportionality – but their weight would be discounted in light of the fact that they are agentially mediated.

The argument I have laid out has implications regarding how we ought to weigh not only enabled acts of terrorism but the harms associated with attacking involuntary human shields. Involuntary human shields function by increasing the moral costs of achieving tactical or strategic goals, specifically by forcing the enemy to decide between either abandoning the goal or killing innocent civilians as a side-effect of achieving the goal. By incentivizing the former option, those who use involuntary human shields attain an advantage. As with enabled harms, the harms resulting from the deaths of

involuntary human shields are caused in part by what we do, and in part by what the enemy does.

But unlike the killings in which enabled harms consist, the killings in which involuntary human shields consist are committed by *us*, rather than by the enemy. For this reason, it is inaccurate to describe the deaths of involuntary human shields as ‘agentially mediated,’ despite that such deaths are partly a result of the wrongful actions committed by the enemy. That is, such deaths are not enabled harms. Still, the fact that the deaths of involuntary human shields are partly a result of the wrongful actions committed by the enemy might be sufficient grounds for discounting the weight of these harms in the calculation of proportionality. But even if this is so, it turns out that such harms ought *not* to be discounted when they are committed by an occupying military force.

To expand on the scenario under consideration, suppose, prior to the invasion, the Superpower surmises that such an invasion will spark an insurgency, elements of which will house mobile military units in civilian-populated buildings, from which they will launch rockets and mortar shells. The Insurgency will use these involuntary human shields in order to deter defensive and retaliatory attacks upon the mobile military units. In the *ad bellum* calculation of proportionality, if we ought not to discount the weight of the harms resulting from the enabled acts of terrorism that will be committed by the Insurgency – on the grounds that the Superpower has a special obligation as the occupying military force to protect the civilian population – then we also ought not to discount the weight of the harms resulting from attacking the civilians that the insurgents use as involuntary human shields. To kill outright those whom the Superpower is charged with protecting would obviously violate the special obligation it has to protect these civilians. Thus the weight of the harms resulting from the deaths of involuntary human shields should not be discounted (relative to the harms collaterally imposed on civilians who were not involuntary human shields) despite that the Insurgency intentionally put the civilians in harm’s way by concealing mobile military units in their vicinity.

The upshot is that satisfying the proportionality constraint in a war of military occupation is even more difficult than has previously been thought, not only because the enabled acts of terrorism ought not to be discounted for

being agentially mediated, but also because harms imposed on involuntary shields ought not to be discounted for being caused in part by the wrongful acts of the enemy. The manual of the Law of Armed Conflict published by the UK Ministry of Defence makes the legal claim (which is presumably based in part on a moral judgment) that the harms collaterally imposed upon involuntary human shields ought to be discounted in a calculation of proportionality.¹⁹ But even if the manual's claim is generally correct, wars of territorial occupation are an important defeater to this general claim.

The account I have laid out – an account of how we ought to weigh certain sorts of harms when calculating the proportionality of wars of military occupation – can be seen as part of the larger project of developing an account of the obligations that come with occupying a foreign country. Though the US government is currently in an isolationist mood, partly as a result of the recent global economic upheaval, history suggests that this isolationism will not last; there is little reason to believe that regime-change by way of military occupation will be permanently abandoned as a military policy. Hence, it is not enough to develop a full-compliance theory which specifies the conditions under which occupying a foreign country is morally permissible – we must also develop an account which specifies the obligations that come with occupying a foreign country even when the occupation is unjustified. The account I have presented regarding the role that enabled harms play in the calculation of proportionality during wars of military occupation is, I hope, a step in that direction.

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¹⁹ The UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press: 2004), Sects. 2.7.2, 5.22, 5.22.1.

Acknowledgments

For invaluable comments on earlier versions of this paper, I wish to thank David Brink, Richard Arneson, Larry May, and the anonymous referees at *Law and Philosophy*.